



BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions of the Courts Below.

The findings and conclusions of the United States District Court for the Western District of Michigan, Southern Division, were filed May 18, 1943, (R. 18) and the decree entered pursuant thereto on May 24, 1943 (R. 29). The findings and conclusions adopted by the Court are reported in 50 Fed. Supp. 552.

The opinion of the Circuit Court of Appeals for the Sixth Circuit was filed December 16, 1943 (R. 254). It is reported in 139 Fed. 2d 695. Petition for rehearing (R. 257) was denied February 14, 1944. (R. 281.)

Jurisdiction.

Note petition (*supra*, p. 2).

Statement of the Case.

The essential facts of the case are stated in the accompanying petition for writ of certiorari.

Specification of Errors.

The errors which petitioner will urge if a writ of certiorari is issued are that the Circuit Court of Appeals for the Sixth Circuit erred:

1. In holding that claims 4, 5, 7, 8, 9, 10 and 11 (of which claims 4, 8 and 10 are typical) of the Machine Patent were not infringed.
2. In holding that claims 1-6, inclusive, (of which claims 4 and 6 are typical) of the Cutter Patent were not infringed.
3. In failing to adhere to the guiding principles set down by the Court in its prior decision in *Blanc v. Curtis*, 119

F^{ed.} 2nd 395, on which to determine infringement in this cause, and which failure so to do has resulted in confusion and lack of uniformity of decisions within the Sixth Circuit, with respect to the scope and interpretation of the Machine and Cutter Patents.

4. In failing to follow its prior decision in the case of *Blanc v. Curtis* with respect to the determination of infringement in this cause, thus leading to a conflict between the decision in this case and District Court decisions in the Eighth Circuit based on said case of *Blanc v. Curtis* as a precedent.

ARGUMENT.

Validity of Machine and Cutter Patents Sustained.

The validity of the original and Reissue Machine Patent, as well as the Cutter Patent, has been sustained by the Court of Appeals for the Sixth Circuit in this cause and in its prior decision of *Blanc v. Curtis*, 119 Fed. 2nd 395, the Court of Appeals for the Eighth Circuit, 109 Fed. 2nd 911, and the District Court for the Southern District of Iowa, Southern Division, 58 U. S. P. Q. 54, 42 U. S. P. Q. 427, 35 U. S. P. Q. 150, and 33 U. S. P. Q. 466. Such findings should not be disturbed by this Court, (*Goodyear Tire & Rubber Co., Inc. v. Ray-O-Vac Co.*, 60 U. S. P. Q. 386, 388; *Williams Co. v. United Shoe Machinery Corp.*, 316 U. S. 364, 367), and the issues herein should be limited to the determination of infringement of the patents.

It is urged that in presenting this petition, respondent does not desire a retrial of the facts, but only a proper application of law which has been established with respect to these patents, in the determination of infringement in this cause.

Machine Patent.

The machine of this patent is essentially a root cutting machine and in this respect it differs from all sewer cleaning machines of the prior art. Petitioner started where the prior art machines left off and created for the first time a new combination of elements which in operation will not only perform the functions of the prior art devices, which is that of merely ramming or dislodging the stoppage in sewers to release the same, but in addition, will perform, for the first time, the operation of cutting large and small roots of trees and shrubs which penetrate and

are frequently found in sewer pipes and which create therein the main and most frequent cause of sewer stoppage.

The Circuit Court of Appeals for the Sixth Circuit in its decision in the case of *Blanc v. Curtis*, 119 Fed. 2nd 395, recognized petitioner's contribution in the art, wherein it stated on page 396:

"However, the problem of cutting roots in sewers is a different problem from that of merely ramming out debris collected in the sewer, and this new and valuable result was accomplished for the first time in *Blanc*."^{*}

A specific embodiment of petitioner's invention is shown in the patent (R. 213; see also Sheet 1 at end of brief). From the drawings and description it clearly appears that the machine comprises: an elongated flexible element 49 of coiled spring wire which is capable of being inserted to any desired length in a sewer pipe and when the end thereof is held against rotation by the cutter 56 engaging the roots, of being wound to high tension; a reel 28 for holding and storing the spring wire element; a guide 20 on the axis of the reel through which the spring wire element passes when it is fed onto and off of the reel; a motor 57 for imparting rotary movement to the reel and to the spring wire element; and an anti-kinking device in the form of a tubular member 35 which imparts to the portion of the spring wire element lying between the reel and the guide the formation of a crank and which maintains this crank formation against kinking under conditions of high tension so that at all times during the operation of the device, the spring wire element may be turned by the crank and thereby be wound up to create a high tension required for the cutting of the roots. This tension when released func-

^{*}Emphasis ours unless otherwise indicated.

tions to exert a high and quickly applied force to the root cutter 56 which is mounted on the inner end of the spring wire element, with the result that the roots are quickly and effectively removed from the sewer.

The action of the high tension spring is more particularly described in the patent (R. 214 (p. 2 of Patent), lines 49 to 59, Col. 2).

Petitioner's commercial embodiment of the patent, Exhibit IV, reproduced for convenience on Sheet 2 at the end of the brief, answers to the above description, the same embodying an internal type of reel, however, instead of the external type of reel of the specific disclosure of the patent.

The Court of Appeals for the Sixth Circuit, however, in the case of *Blanc v. Curtis*, 119 Fed. 2nd 395, held that such reels are equivalent and stated at page 397:

“In appellee's machine (Patent 1,963,561, issued to Sanger), the shaft is coiled inside an annular space within the periphery of the drum or reel rather than wound on a hub in the usual manner. Appellant's commercial embodiment of the patent also uses an internal reel rather than the external reel shown in the drawings and we regard the difference between the reels as immaterial.”

Accordingly, the Court of Appeals in the case of *Blanc v. Curtis* necessarily decided that claim 4, then in issue, was not limited to a machine in which an external type of reel was employed and ascribed to petitioner's invention, as defined by said claim, a device embodying an internal type of reel used in conjunction with a tubular anti-kinking device.

In deciding the case of *Blanc v. Curtis*, the Court of Appeals had occasion to refer to the decision of the Dis-

trict Court for the Southern District of Iowa, Southern Division (8th Circuit), in the case of *Blanc v. Weston, et al.*, 42 U. S. P. Q. 427, in which claim 4 of the Machine Patent was similarly construed.

In the more recent cases of *Blanc v. Longstaff* and *Blanc v. Smith*, 58 U. S. P. Q. 54, the same District Court, in recognizing the precedent established by the Court of Appeals for the Sixth Circuit in *Blanc v. Curtis*, with respect to claim 4, held the defendant's devices to infringe the Machine Patent. Defendant Longstaff's machine corresponded substantially to petitioner's commercial embodiment of the patent.

As stated by the court at page 54:

“Despite what has been said in argument, it seems to me that the machines, the accused machines here, are studied attempts to make changes in Mr. Blanc's disclosures in his patent and in his merchantable machine, and I can't see very much difference in them. They are based upon the same general mechanical arrangement.”

Further,

“Of course that just ends the argument as against the infringement by Mr. Longstaff here, because the machine has all of the other elements, unless it would be the fact that by reason of the reel being in the nature of a cage, instead of reeling the coil on the outside he takes the coil from the inside of the reel. I can't see where that would make any mechanical difference. *Certainly there is no differentiation of that matter in the claims of the patent.* Take those two things out and as far as Mr. Longstaff's patent is concerned, they are practically identical.”

The structure of respondent's sewer cleaning machine can be best determined from Exhibit V (R. 220, 221) and

Exhibit VI (R. 222; see also Sheet 2 at end of brief), and as constructed contains all of the novel characteristics of the invention of the Machine Patent and fully responds in every respect to the definition which the Courts in the cases above identified have given to the Blanc invention.

As shown on Sheet 2 at the end of the brief, it is clear that the machine employs a flexible high tension spring element 4 which is mounted upon a storage reel 21 driven through the medium of a motor (R. 220, 221). The spring element passes through a tubular member 27 mounted on the axis of rotation of the reel, and which serves to provide a guide for the spring element at the front of the machine while paying out and retracting the same. The tubular member also serves as a means to prevent kinking of the high tension spring element and disposes the same in crank-like formation whereby torsional energy may be wound into the flexible spring element.

The operation of respondent's machine is described in Exhibit V (R. 220, 221).

Of the seven claims in issue, typical claims 4, 8 and 10 are set out for convenience on Sheet 1 at the end of the brief. It will be observed that respondent's device responds literally and in spirit to the terms of said claims. The device incorporates an internal type of reel which the Courts in the cases referred to above have held to be equivalent to the external type of reel of the specific embodiment of the invention, as disclosed in the drawings. It is further observed that the claims in issue are not limited with respect to the type of reel forming an element in the combination.

Respondent's machine also incorporates an anti-kinking tubular member 27 performing the same function in and cooperating with the other elements of the assembly as

specifically taught by petitioner in his Machine Patent and which is the very element which the Court of Appeals for the Sixth Circuit in *Blanc v. Curtis* held was covered by claim 4 of the Machine Patent. This means is of vital importance in the assembly to prevent kinking of the cable at all times in that part of the machine which the District Court in the cases of *Blanc v. Longstaff* and *Blanc v. Smith* (58 U. S. P. Q. 54) (8th Circuit) described as the vulnerable spot in the entire mechanism.

It is also clear from respondent's own admissions on cross-examination that his device infringes the Machine Patent (R. 162-167; also see Petition for Rehearing R. 268-273).

The Court of Appeals for the Sixth Circuit in this cause, however, failed to follow the established precedent of its own decision in *Blanc v. Curtis* and in a perfunctory approval and adoption of the District Court's conclusions, held respondent's device not to infringe the claims in issue, although the Court obviously intended to adhere to the determinative principles enunciated in its prior decision in *Blanc v. Curtis*, as evidenced by its specific reversal of the District Court's decision with respect to claim 4 as being in contravention of the decision of the Court in that case.

The decision in this cause is clearly against the evidence in the case and the physical facts clearly demonstrate the unsoundness of the same (See Petition for Rehearing R. 257).

The decision of the Court of Appeals for the Sixth Circuit in this cause, with respect to infringement, is in clear conflict with its prior decision in *Blanc v. Curtis* and the decisions within the Eighth Circuit. Such lack of uniformity and inconsistency between the decisions with

respect to infringement of the Machine Patent has caused and will cause the general public undue hardship and uncertainty in determining what machines constitute infringements of the same, and will lead to unnecessary and expensive litigation unless such conflict is determined by this Court.

Cutter Patent.

The invention of this patent relates to a specially designed and constructed cutter which is capable of functioning as the cutter element attached on the end of the high tension spring element of the root cutting machine.

The cutter of the Patent (R. 217), the drawing for which is reproduced for convenience on Sheet 1 at end of brief, comprises a head adapted to be attached to the flexible spring element at one end and having blades attached to the other end for cutting roots and removing debris from sewers. The assembly is characterized as embodying the following essential features, namely—

- (a) The blades must diverge outwardly from the mounting hub;
- (b) The blades must be capable of flexing inwardly and outwardly in such manner that they may be pressed together so as to enter and pass through small restrictions in pipes, such as encountered at inlet openings and at joints and bends therein, and when once inside to again expand to their original positions;
- (c) The blades must have rearwardly inclined cutting edges which will exert a holding action for stopping the end of the wire spring to cause the same to wind up to create the required high tension therein, and at the same time exert a draw cutting action to sever the roots when the spring tension is released and high rotary motion is imparted to the cutter;

(d) The leading ends of the cutter must be turned inwardly to produce a sled-runner action in sliding over and passing restrictions and bends in the pipe; and

(e) The blades must have such flexibility as to be capable of responding to centrifugal force produced by the high speed rotary motion created when the high-tension spring is released, so as to be expanded by such force to a maximum divergence and to thereby engage the inner surface of the pipe or sewer, irrespective of the size thereof, and to cut the roots flush with the pipe surface, with the result that the pipe is entirely freed of all roots growing therein.

The action of the cutter is described in the specification of the patent (Rec. 218 (p. 2), lines 6 to 19, Col. 1).

Petitioner's Cutter Patent was recognized by the Court of Appeals for the Sixth Circuit in *Blanc v. Curtis*, 119 Fed. 2nd 395, as covering a pioneer implement and should be liberally construed. As was therein stated on page 399:

“Appellant's cutter is a pioneer implement, and should be given a construction sufficiently broad to realize the purpose of the patent. It is a meritorious improvement, substantially advancing the art, and is entitled to a liberal construction. *National Battery Co. v. Richardson Co.*, 6 Cir., 63 F. 2d 289, 293. Appellant's and appellees' cutters are substantially identical, operating on the same principle and accomplishing the same result in substantially the same way. Cf. *Sanitary Refrigerator Co. v. Winters*, 280 U. S. 30, 50 S. Ct. 9, 74 L. Ed. 147; *Sun Ray Gas Corp. v. Bellows-Claude Neon Co.*, 6 Cir., 49 F. 2d 886. The use of a knife practically identical with one of the accused cutters was held in *Blanc v. Weston*, 35 U. S. P. Q. 150, to violate the injunction issued in *Blanc v. Weston*, 33 U. S. P. Q. 466.”

The scope and interpretation given to claims 3 and 6 by the Court of Appeals in holding the same infringed by

appellee's cutters conforms in all respects to that of the District Court for the Southern District of Iowa, Southern Division, in the cases of *Blanc v. Weston*, 33 U. S. P. Q., and *Blanc v. Weston*, 35 U. S. P. Q. 150, referred to and acquiesced in by the Court of Appeals in deciding that case.

As with respect to the Machine Patent, the case of *Blanc v. Curtis* established a precedent which was followed in the cases of *Blanc v. Longstaff* and *Blanc v. Smith*, 58 U. S. P. Q. 54, wherein the District Court for the Southern District of Iowa, Southern Division, again reiterated its position with respect to the Cutter Patent in holding claims 1-6, inclusive, valid and infringed, and stated at page 55:

“* * * I don't know whether the thought originated when I wrote the opinion or not, but whether I did then or not, I have since felt—and I am glad to see it was the same thought held by the writer of the Opinion of the Sixth Circuit Court (49 U. S. P. Q. 282), Judge Allen—that Mr. Blane in his knife has a basic, fundamental and pioneer patent.”

Respondent's cutters are fairly represented in Exhibit V (R. 220) and Exhibit VII (R. 223; see also Sheet 3 at end of brief), and possess all of the peculiar characteristics and special features above enumerated which identify petitioner's contribution in the art, as is apparent from the descriptive matter appearing on Exhibit V (R. 220, 221). The cutters are designed to be introduced through a small opening of a pipe, and then expand to the diameter of the large tiles under the action of centrifugal force, and finally engage the roots, exert the holding action requisite for winding a high tension in the flexible element (where such action is necessary), and chop the roots flush with the tile wall.

The function and operation of the cutters is identical to that of petitioner's patented cutters (R. 158, 159, 160).

While respondent's cutters are formed with the blades in opposite relation to one another, this feature was considered immaterial by the Court of Appeals for the Sixth Circuit in the case of *Blanc v. Curtis*, 119 Fed. 2d 395, in conformity with the broad interpretation placed upon claims 3 and 6 then in issue.

The Court therein stated on page 399:

"In view of the construction that we give this patent we do not consider these variations material, nor that the rearward inclination of the blades as distinguished from that of the cutting edges is the gist of appellant's invention. We agree with the Court of Appeals for the Eighth Circuit (*Blanc v. Weston*, 109 F. 2d 911, 912) that an essential characteristic of the Blanc cutter patent is a thin flexible cutting member of very high resilience. * * *"

Similar cutters were held to be infringements of the patent in the case of *Blanc v. Curtis* (Exhibits X-A to X-E; R. 224, 225, 226; See also Sheet 3 at end of brief).

That the Court of Appeals for the Sixth Circuit intended to decide the present case in contravention of the earlier decision of the Court in *Blanc v. Curtis*, is negated by the statement of the Court in its decision. Accordingly, the decision in this cause now stands in direct conflict with the Court's prior decision.

The decision is likewise in conflict with the District Court's decisions in *Blanc v. Weston*, 33 U. S. P. Q., and *Blanc v. Weston*, 35 U. S. P. Q. 150, (8th Circuit), in which cutters practically identical to the cutters of the *Blanc v. Curtis* case were held to infringe the patent. (See *Blanc v. Curtis*, 119 Fed. 2d 395, 399).

The decision is also in conflict with the decision of the District Court in the cases of *Blanc v. Longstaff* and *Blanc*

v. *Smith*, 58 U. S. P. Q. 54, 55 (8th Circuit) which specifically referred to the decision in *Blanc v. Curtis* as a precedent in holding the accused cutters to infringe the patent.

While the Court of Appeals for the Sixth Circuit in deciding the case of *Blanc v. Curtis* referred to and agreed with the conclusions reached by the Court of Appeals for the Eighth Circuit in the case of *Blanc v. Weston*, 109 Fed. 2d 911, it nevertheless gave to the claims of the Cutter Patent an interpretation broader than accorded claim 6 by the Court of Appeals for the Eighth Circuit in that case. The cases may be reconciled, however, as to infringement, for the reason that the cutter involved in the Weston suit embodied rigid blades, whereas the blades of the cutters in the Curtis suit were flexible and resilient.

The situation with respect to the Cutter Patent, as it now presents itself to the public generally, is an array of conflicting decisions within the Sixth and Eighth Circuits, whereby it is impossible to determine whether or not infringement exists with respect to any particular cutter. It must be recognized that the hopeless confusion which now exists relative to the question of infringement of the Cutter Patent exists because of the fact that the District Court in this cause completely failed to follow its own appellate court's decision in the earlier case of *Blanc v. Curtis*, 119 Fed. 2d 395, as a precedent, and the Court of Appeals' acceptance and acquiescence in the District Court's conclusions in apparent disregard for the legal precedent established by said earlier case of *Blanc v. Curtis*, though it evidenced an intention not to decide the present cause in contravention to the decision of the earlier case, and even though the District Court of the Eighth Circuit in the cases of *Blanc v. Longstaff* and *Blanc v. Smith*, 58 U. S. P. Q. 54, *Blanc v. Weston*, 35 U. S. P. Q. 15 and 33 U. S. P. Q. 466, has

consistently and uniformly construed and interpreted the claims thereof in accordance with the construction placed upon them by the Circuit Court of Appeals in said earlier case of *Blanc v. Curtis*.

No attempt was made by the Court of Appeals in the present cause to distinguish over its prior decision and as a result the public is faced with irreconcilable decisions within the Sixth Circuit with respect to infringement of the Cutter Patent because of the fact that the cutters in both instances are clearly similar and the rule of law of the earlier case is equally applicable to respondent's cutters.

If the decision in the present cause overrules the position established by the Court in its former decision in *Blanc v. Curtis*, the public at large has been unadvised in this case and is unable from these decisions to determine which decision is to be recognized as authority with respect to infringement. Should this situation continue and the public determine of its own accord what decision of the Sixth Circuit is to prevail with respect to the interpretation of and the construction to be given to the Cutter Patent, confusion and uncertainty will continue, inasmuch as a determination one way or the other will be inconsistent with either the decision of the Circuit Court of Appeals for the Eighth Circuit in *Blanc v. Weston*, 109 Fed. 2d 911, or the decisions of the District Court in cases of *Blanc v. Weston*, 33 U. S. P. Q. 466, *Blanc v. Weston*, 35 U. S. P. Q. 150 and *Blanc v. Longstaff* and *Blanc v. Smith*, 58 U. S. P. Q. 54.

The utter lack of uniformity and consistency in the application of established law with respect to infringement by the Court of Appeals for the Sixth Circuit, and the conflicts existing between decisions of the Courts of the Sixth Circuit and Courts of the Eighth Circuit in interpreting the claims of the Cutter Patent necessarily places the public at large in an exceedingly embarrassing position with re-

spect thereto, thus clearly presenting a situation requiring the exercise of this Court's powers to determine the proper scope and interpretation of the claims of that patent.

For the reasons above stated, it is urged that the petition for writ of certiorari be granted.

Respectfully submitted,

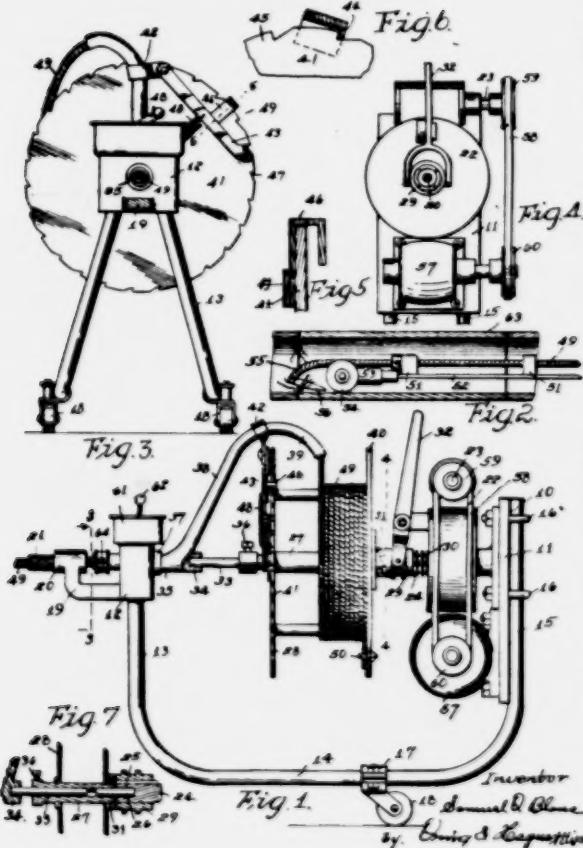
GORDON F. HOOK,
Counsel for Petitioner.

June 16, 1942.

S. O. BLANC
DRAIN CLEANER

Original Filed Aug. 20, 1934

Re. 22,113



TYPICAL CLAIMS

4. In a cleaner for drain pipes, the combination of a frame, a flexible shaft adapted to support a cutter element at one end and to be moved longitudinally into a drain pipe and to be rotated therein, a reel for supporting the unused end of said flexible shaft, means for rotatably mounting said reel in said frame to permit said reel to rotate to impart torsional motion to said shaft, a guide for the flexible shaft supported in position spaced from said reel and substantially in the axis of said rotation of the reel, the flexible shaft being passed from said reel through said guide, and means supported between the reel and guide adapted to rotate with said reel for guiding that portion of the flexible shaft between the reel and guide to prevent kinking and buckling when torsional strain is applied to said flexible shaft.

5. In a cleaner for drain pipes, the combination of a frame, a flexible shaft adapted to support a cutter element at one end and to be moved longitudinally into a drain pipe and to be rotated therein, a reel for supporting the unused end of said flexible shaft, means for rotatably mounting said reel to permit the reel in said frame to rotate to impart torsional motion to said shaft, a tubular shaft mounted to rotate relative to said reel and in alignment with the axis of said rotation of the reel, the inner end of said tubular shaft being bent inwardly and terminating at a point near said reel for guiding the free end of said flexible shaft from said reel through the outer end of said tubular shaft to prevent kinking and buckling of the shaft when torsional strain is applied thereto.

10. A machine for cleaning sewers and the like, comprising an elongated flexible coiled wire spring element capable of being projected into circuitous sewer pipes and of being wound to a high tension and of storing therein energy therein of sufficient magnitude to drive a cutter to be mounted on the outer end thereof through roots or other obstruction found in sewers, a guide through which said spring element is free to pass axially and in which it may twist or rotate, and a reel mounted for rotation on an axis in alignment with the axis of said guide, said spring element having its inner end fixed to said reel, said reel being adapted by rotation on said axis to permit of paying out and reeling in desired lengths of said spring element as may be required in use, and serving to hold in coiled relationship about said axis such portions of said spring element as may be unused at any particular time, means between said guide and reel for at all times maintaining that portion of the spring element which is disposed between the guide and reel against kinking or buckling when under tension and in a crank-like formation, and at all times permitting such portion to pass axially therethrough and to twist or rotate therein, said reel further serving, by rotation on said axis, to impart bodily rotation to said spring element when its outer end is free to rotate, and a twist thereto to store tension therein when its outer end is held against rotation, and said spring element being free to twist and store such energy throughout its entire length including such portion thereof as may be held in coiled relationship by said reel, and means for imparting rotation to said reel in a direction to wind tension in said spring element and to maintain the unused portion thereof in coiled relationship.

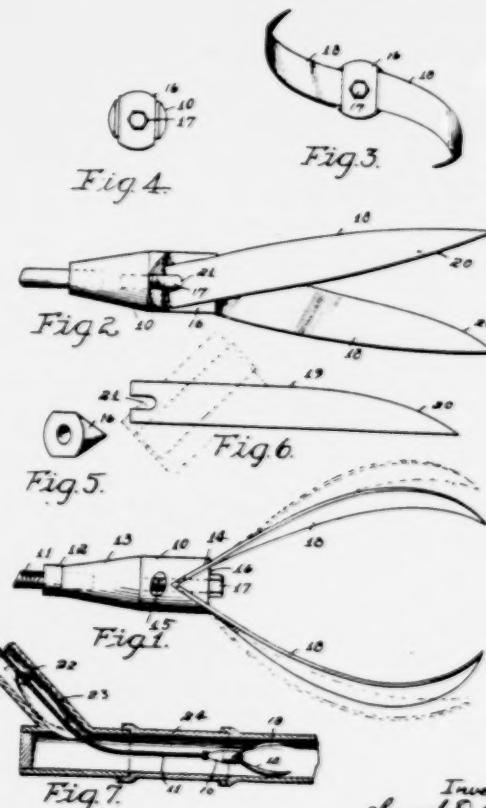
Feb. 9, 1937.

S. O. BLANC

2,069,871

CUTTER MEMBER FOR CLEANING DRAIN PIPES

Filed Oct. 21, 1935



TYPICAL CLAIMS

4. A cutter for drain cleaners comprising a cutter head having one end adapted to be attached to a flexible shaft, the opposite end of said head being provided with a recess having inwardly inclined side walls, a wedge for said recess, a plurality of cutter blades adapted to have one or more of corresponding ends clamped between the inclined faces of said recess and said wedge, and means for forcing and retaining the wedge into clamping position between said blades.

5. A cutter for drain cleaners comprising a head having one end adapted to be attached to a flexible shaft, a plurality of cutter blades formed of thin and flexible material having one set of corresponding ends fixed to said head in a diverging manner, said blades being inclined from said head and rearwardly relative to their direction of rotation, having their free ends inclined inwardly towards the axis of rotation of said cutters, whereby a draw cutting effect will be produced by the cutting edges of said blades as they engage inwardly extending roots within the drain in which the cutter is operated, the inclined ends of said blades being adapted to guide the cutter through drains having offset portions to prevent the cutting edges of said blades engaging the said offset portions, said blades being flexible to permit the cutter to be operated in drains of various diameters.

Inventor
Samuel O. Blanc
by Doug & Lagard, Atts.



DEFENDANT'S ACCUSED DEVICE EXHIBIT VI.

PLAINTIFF'S COMMERCIAL MACHINE SHEET-2.

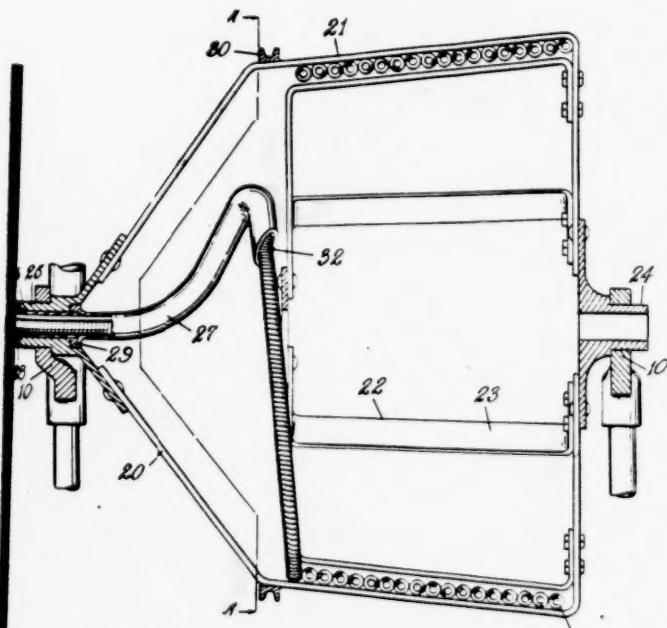


Fig. 1

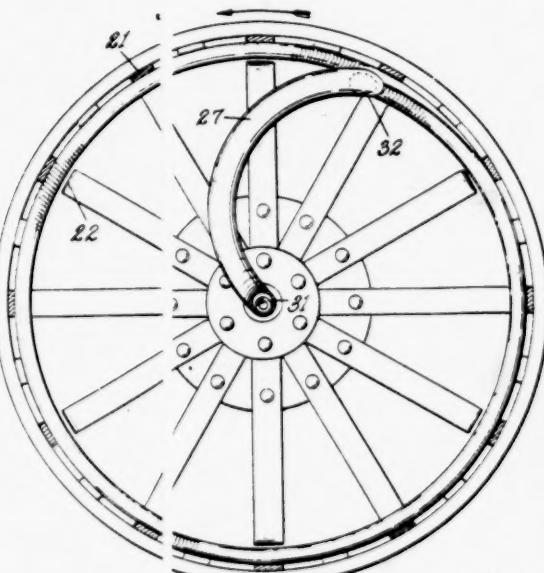


Fig. 2



DEFENDANT'S ACCUSED CUTTERS

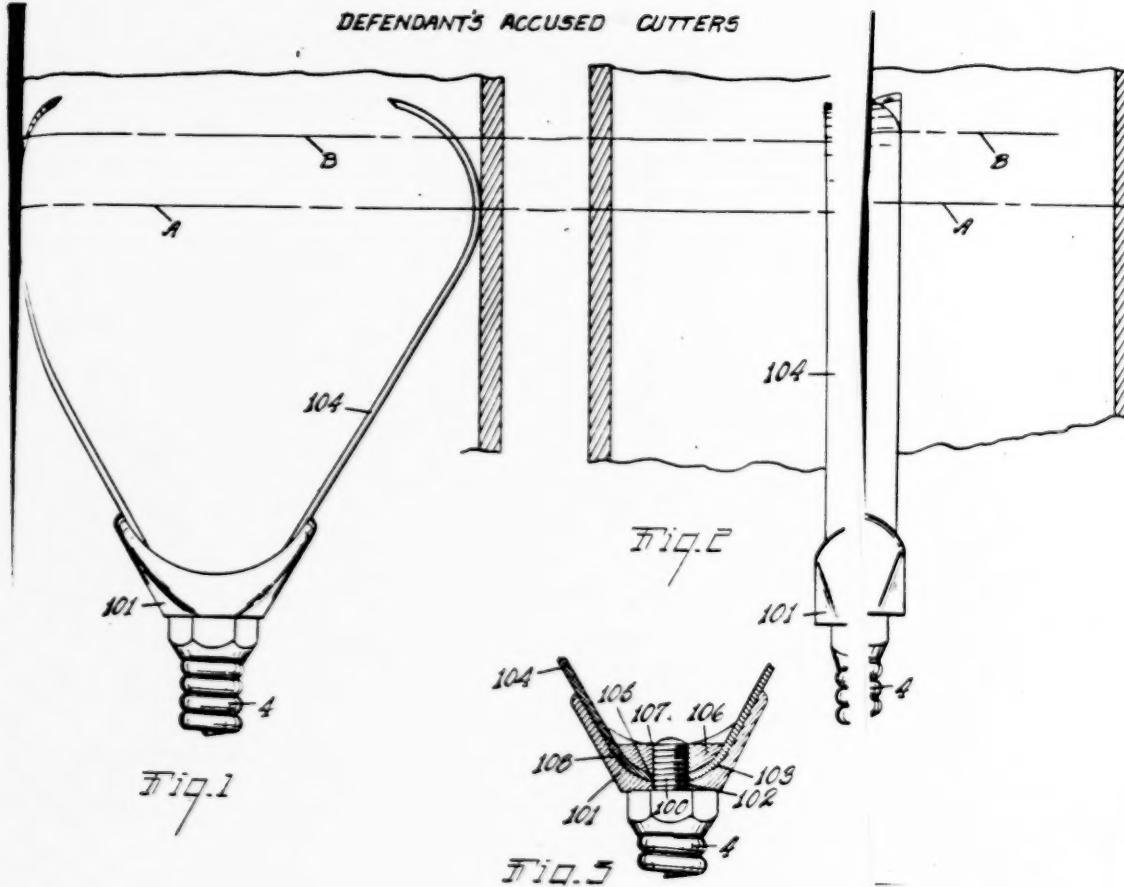
CUTTERS HELD TO INFRINGE CLAIMS
3 AND 6 OF CUTTER PATENT IN CASE
OF BLANC VS CURTIS, 119 F 2D 395

EXHIBIT X-A

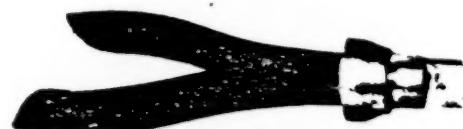


EXHIBIT X-D

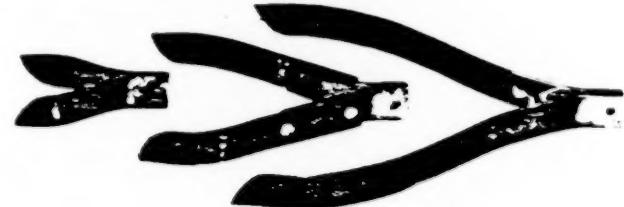


EXHIBIT X-E

